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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA M. WOOD ., et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED[1]

Did the court of appeals err in ruling that Congress intended state common law design defect damage claims to be preempted by the National Traffic and Motor Vehicle Safety Act of 1966 and federal standards covering the same subject as the defect when Congress explicitly provided that "[c]ompliance with any [such] standard . . . does not exempt *any* person from *any* liability under common law"?

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[1] Petitioners Patricia M. Wood, Francis X. Wood, and Elizabeth Wood appeared as plaintiffs-appellees below. Respondent General Motors Corporation appeared as defendant-appellant below. In addition, the Massachusetts Public Interest Research Group; the Association of Trial Lawyers of America; the Product Liability Advisory Council, Inc.; the Automobile Importers of America, Inc.; and the Motor Vehicle Manufacturers Association of the United States, Inc., appeared as *amici curiae* in the court of appeals.

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OPINIONS BELOW

The opinion of the district court is reported at 673 F. Supp. 1108 (D.Mass. 1987) and appears in the separately bound appendix being filed with this petition at Pet. App. 71a -101a. The majority and dissenting opinions of the court of appeals are reported at 865 F.2d 395 (1st Cir. 1988) and appear at Pet. App. 1a - 70a. The unpublished orders of the court of appeals denying reconsideration and rehearing *en banc* appear at Pet. App. 104a -105a. The unpublished order of the court of appeals denying revocation of the mandate and reconsideration and rehearing *en banc* appears at Pet. App. 106a.

JURISDICTION

The judgment of the court of appeals was issued on December 28, 1988. Pet. App. 103a. The order denying

rehearing *en banc* was entered on February 7, 1989. Pet. App. 105a. On April 26, 1989, Justice Brennan issued an order extending the time for filing a petition for a writ of certiorari until July 7, 1989. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.*, P.L. 89-563, 80 Stat. 718 ("Safety Act") provides in pertinent part as follows:

> § 1392(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.
>
> * * * *
>
> § 1397(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Relevant excerpts from Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208, appear at Pet. App. 107a - 110a. The 1976 GM Blazer at issue in this case is a "multi-purpose passenger vehicle with GVWR [gross vehicle weight rating] of 10,000 pounds or less manufactured on or after January 1, 1976." 49 C.F.R. § 571.208 S4.2.2.

STATEMENT

This is a diversity action filed pursuant to 28 U.S.C. § 1332, seeking damages under Massachusetts law for severe personal injuries suffered in a car crash. On May 19, 1981, petitioner Patricia Wood was riding home from school as a passenger in the front seat of a 1976 General Motors Blazer. The car crashed, Patricia was thrown forward, her neck was broken, and she was rendered a quadriplegic.

In May 1984, Patricia and her parents filed this lawsuit in the United States District Court for the District of Massachusetts seeking damages from respondent General Motors, the manufacturer of the Blazer in which she was riding. They alleged that the Blazer was defectively designed because it did not contain some form of passive restraints, *i.e.,* airbags or automatic seatbelts (seatbelts that do not require the individual to "buckle up" to be effective). They further alleged that, if the Blazer had been properly designed, Patricia would not have been injured.

General Motors moved for summary judgment in the district court on two grounds. First, it argued that plaintiffs had failed to state valid claims under Massachusetts law. Second, it argued that, if Massachusetts law did recognize plaintiffs' claims, then that law was preempted by the Safety Act. GM noted that, in designing the 1976 Blazer, it had fully complied with Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208, which permitted, but did not require, it

to install passive restraints. It contended that plaintiffs' claims, if successful, would force it to install airbags in all cars and were, therefore, expressly preempted by 15 U.S.C. § 1392(d), which prohibits any State from establishing "any safety standard" applicable to the "same aspect of performance" as a Federal standard "which is not identical to the Federal standard." GM also argued that plaintiffs' claims were impliedly preempted because, if successful, they would make compliance with both federal and Massachusetts law a physical impossibility and would frustrate the purposes of the Safety Act and Standard 208.

On May 8, 1987, the district court denied GM's motion. First, it held that, if plaintiffs were able to prove their claims, they were entitled to recover damages from GM under Massachusetts law. That ruling was not before the court of appeals and is not before this Court. Second, it ruled that the Safety Act neither expressly nor impliedly preempts plaintiffs' claims. It rejected GM's express preemption argument on the grounds that (1) Congress knows how to explicitly preempt common law claims when it wants to do so; (2) section 1392(d) does not expressly refer to common law claims, but, rather to state "safety standards"; and (3) section 1397(c) does refer to common law claims and unequivocally provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 673 F. Supp. at 1113-14, Pet. App. 80a - 82a. It rejected GM's "physical impossibility" argument on the ground that GM could physically comply with both federal and Massachusetts law by continuing its design and paying damages to injury victims. 673 F. Supp. at 1114-16, Pet. App. 82a - 85a.[2] It rejected GM's "frustration of purpose" argu-

[2] GM could, of course, also physically comply with both federal and Massachusetts law by installing passive restraints.

ment on the grounds that (1) it saw no conflict between plaintiffs' claims and the purposes of the Safety Act or Standard 208 and (2) to the extent that any such conflict exists, it is one that Congress intended to accept by enacting section 1397(c). 673 F. Supp. at 1116-19, Pet. App. 86a -93a. It noted that both the presumption against preemption and this Court's ruling in *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), weighed heavily against a finding that Congress, without saying so clearly, intended to preempt Massachusetts common law and leave plaintiffs without any remedy. *Id.*

GM moved to certify the decision for interlocutory appeal. The United States Court of Appeals for the First Circuit granted that request in part, certifying the following question for appeal: "Whether federal law preempts a state product liability claim against a motor vehicle manufacturer based on its installing seat belts, rather than airbags, in a motor vehicle." 865 F. 2d at 397, Pet. App. 3a - 4a.[3]

On December 28, 1988, the court of appeals issued its decision, holding 2 to 1 that plaintiffs' claims were impliedly preempted. In an opinion written by Chief Judge Campbell and joined by District Judge Laffitte, sitting by designation, the majority agreed with the district court that section 1392(d) did not expressly preempt common law claims, but accepted GM's contention that plaintiffs' claims, if successful, would force the auto manufacturers to install airbags in all cars. It conceded that section 1397(c), as written, preserved all common law claims, including plaintiffs', but could see no reason why Congress would have wanted to

[3] Plaintiffs objected below to this formulation of the question because they do not claim that GM was negligent for installing seatbelts *rather* than airbags; they claim that GM should have installed either airbags *and* seatbelts or some other form of passive restraints, such as automatic seatbelts. The court of appeals' ruling, however, did not turn on this distinction.

preserve common law claims that, in its view, would have the same effect as a state regulatory standard that would be preempted by section 1392(d). It, therefore, concluded that Congress must have written 1397(c) and 1392(d) as it did because, in 1966, "the only kind of legal claim which could give rise to the present dilemma — a cause of action based upon alleged automobile design defects — had yet to take its place in the arsenal of the plaintiffs' bar." 865 F.2d at 402, Pet. App. 15a Congress, the majority said:

> did not foresee the possibility of litigation that could, in effect, impose a new and conflicting state safety standard on national automobile manufacturers. Had Congress done so, we think, the same logic that dictated the insertion of section 1392(d) would have inescapedly dictated that section 1392(d) extend to this situation.

865 F. 2d at 402, Pet. App. 15a. Based on these assumptions, the majority held that the Safety Act impliedly preempts plaintiffs' claims and all other common law design defect claims that would have "an effect similar to a state regulation" that would be preempted by section 1392(d). 865 F. 2d at 410, Pet. App. 32a.

Judge Selya's dissent accused the majority of ignoring the plain and unequivocal language of section 1397(c) and found that plaintiffs' claims were neither expressly or impliedly preempted. It asserted that Congress was aware of design defect litigation in 1966 and that, in any event, Congress was certainly aware that the common law continually developed and evolved. 865 F. 2d at 421, 423; Pet. App. 57a - 58a, 60a - 62a. It observed that the majority's interpretation of the Safety Act conflicted with the interpretations adopted by other circuits, 865 F. 2d at 422, 426; Pet. App. 59a - 60a, 68a - 69a, and disputed the majority's contention that plaintiffs' claims, if successful, would necessarily prompt all

manufacturers to install passive restraints. 865 F. 2d at 426; Pet. App. 68a. It argued that the majority was ignoring the sharp distinction that Congress drew between direct state regulation (which Congress preempted) and the indirect regulatory effect of common law claims (which Congress expressly preserved). It asserted that Congress's distinction was a reasonable one and that, even if the majority disagreed with it, it was duty bound to accept it. 865 F. 2d at 423-426, Pet. App. 62a - 70a.

Plaintiffs moved for reconsideration and rehearing *en banc*, but, on February 7, 1989, these motions were denied. Pet. App. 104a, 105a. After the mandate was issued, plaintiffs filed a motion asking the court to withdraw the mandate and reconsider its decision in light of the position taken by the United States of America in an *amicus curiae* brief filed before the United States Court of Appeals for the Seventh Circuit in *Ritt v. General Motors Corporation*, No. 88-1822, a case involving nearly identical issues. In that case, in which the court itself asked for the views of the United States and which GM has since settled, the United States argued that the majority's decision below in this case was erroneous:

> That the common law is by its nature a *developing* body of law is one of the chief reasons we reject the alternate means of harmonizing §§ 1392(d) and 1397(c) recently adopted by the First Circuit in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). The *Wood* court held that while § 1397(c) is applicable to tort actions based on manufacturing defects, it should not be applied to authorize actions based on design defects, on the theory that Congress would not have foreseen the development of such actions against automobile manufacturers. *See* 865 F.2d at 403-06. This analysis is erroneous because it ignores the fact

> (well-known to Congress) that the common law is evolutionary, and that design defect litigation was in fact already developing by the mid-1960s. *See id.* at 421-23 (Selya, J., dissenting).

Brief of the United States as Amicus Curiae, at 23 n.13 (emphasis in original).[4] On May 25, 1989, the court of appeals denied plaintiffs' motion. Pet. App. 106a.

REASONS FOR GRANTING THE WRIT

Twenty-four years ago, the publication of Ralph Nader's *Unsafe at Any Speed* (1965) helped spur two major developments in the law. First, it prompted personal injury lawyers and the courts to give increased attention and recognition to a relatively recent development — automobile design defect litigation on behalf of injured drivers and passengers. Second, it prompted Congress to give increased attention to the need for federal auto safety legislation and, ultimately, to pass the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.*

In the intervening years, as automobile design defect litigation has grown, the auto manufacturers have consistently argued that, when they have complied with an applicable Federal motor vehicle safety standard, they cannot be held liable for failing to do more. Equally consistently, the courts have rejected this argument. For the past twenty-four years, they have said: Congress expressly provided in 15 U.S.C. § 1397(c) that compliance "does not exempt *any* person from *any* liability under common law." (Emphasis added.)

In this case, however, the First Circuit has concluded that Congress must not have known of design defect litiga-

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[4] For the Court's convenience, a copy of this brief has been lodged with the Clerk. It has been previously served upon all parties.

tion in 1966 and that section 1397(c) must not mean what it says. Because it saw no reason why Congress would have wanted to preserve common law claims that would have a regulatory effect, it held that all common law claims that would have an effect similar to a preempted state regulation are impliedly preempted. Since, in its view, plaintiffs' claims would have such an effect, the majority ruled that Massachusetts does not have the power to require GM to compensate the plaintiffs for their injuries. This Court should grant certiorari and overturn that ruling for two reasons.

First, the court of appeals' decision conflicts with the decisions of several other federal circuits and state courts of last resort. In numerous design defect cases, these courts have held that compliance with federal standards has no determinative or preemptive effect on state tort liability, even when tort liability might prompt the manufacturers to do more than the federal standards require.

Second, whether Congress intended the Safety Act to preserve all State common law claims, regardless of their regulatory effect, is an extremely important federal question. The decision below seriously misstates the development of design defect litigation and Congress's knowledge of it, directly contradicts Congress's plain words and the presumption against preemption, and turns the implied preemption doctrine into a dangerous and open invitation for judicial disruption of federal-state relations.

1. The Decision Below Conflicts With the Decisions of Other Circuits and State Courts of Last Resort.

Prior to the decision below, eight federal circuit courts and five state courts of last resort had addressed the issue of whether compliance with federal motor vehicle safety standards exempts auto manufacturers from liability in design

defect cases. Some phrased the question as whether compliance with federal standards constituted a defense; others asked whether compliance resulted in federal preemption. Each, however, reached the same conclusion: the Safety Act was not intended to preclude common law claims.

Thus, in the first such case to reach a federal court of appeals, *Larsen v. General Motors Corporation*, 391 F.2d 495, 506 (8th Cir. 1968) the Eighth Circuit stated:

> Section 108(c) of the Act, 15 U.S.C. § 1397(c), expressly negatives any intention of Congress to acquire exclusive jurisdiction in this field and leaves the common law liability intact . . . It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability.

Accord Knippen v. Ford Motor Company, 546 F.2d 993, 1000 (D.C. Cir. 1976); *Dawson v. Chrysler Corporation*, 630 F.2d 950, 957-58 (3rd Cir. 1980), *cert denied*, 450 U.S. 959 (1981); *Stonehocker v. General Motors Corporation*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Dorsey v. Honda Motor Company Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Shipp v. General Motors Corporation*, 750 F.2d 418, 421 (5th Cir. 1985); *Sours v. General Motors Corporation*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Fox v. Ford Motor Company*, 575 F.2d 774, 778 (10th Cir. 1978); *General Motors Corporation v. Edwards*, 482 So.2d 1176, 1198 (Ala. 1985); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737, 746 (Md. App. 1974); *H. P. Hood & Sons, Inc. v. Ford Motor Company*, 370 Mass. 69, 345 N.E. 2d 683, 688 (1976); *Arbet v. Gussarson*, 66 Wis. 2d 551, 225 N.W. 2d 431, 438 (1975).

In several of these cases, the plaintiffs' claims, if successful, might arguably have prompted the manufacturers to alter their conduct on a nationwide basis. The courts were aware of this fact, and sometimes questioned Congress's judgment, but nevertheless concluded that Congress had, indeed, intended to preserve such common law claims. For example, in *Dawson, supra*, 630 F.2d at 962-63, the jury found that a side door design provided inadequate crash protection despite the fact that it complied with Standard 214. The Third Circuit stated:

> The effect of [15 U.S.C. § 1397(c)] is that the states are free, not only to create various standards of liability for automobile manufacturers with respect to design and structure, but also to delegate to the triers of fact in civil cases arising out of automobile accidents the power to determine whether a particular product conforms to such standards ... In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile safety standards ... Inasmuch as it was the Congress that designed the system, and because Congress is the body best suited to evaluate and, if appropriate, to change the system, we decline today to do anything in this regard except to bring the problem to the attention of the legislative branch.

Similarly, in *General Motors Corporation v. Edwards, supra*, 482 So.2d at 1180, the jury found that the placement of the gas tank in the "crush zone" between the rear bumper and axle was negligent, despite its compliance with Standard 301. Affirming the verdict, the Supreme Court of Alabama noted that the jury's decision had "potential national implications," but, fully in keeping with Congress's intent, "refuse[d] to . . . hold" that the standards set by the federal

government were "conclusive". *See also*, *Knippen*, *supra* (turning signal and parking light design complying with Standard 108 found defective); *Dorsey*, *supra* (numerous design aspects complying with federal standards found insufficiently crashworthy); *Shipp*, *supra* (roof design complying with Standard 216 found insufficiently crush-resistant); *Sours*, *supra* (same as *Shipp*); *Fox*, *supra* (rear passenger restraint system found defective because it lacked rear shoulder harnesses, which Standard 209 did not require); *Volkswagen*, *supra* (fuel tank design complying with Standard 301 found insufficiently crush-resistant); *Arbet*, *supra* (same as *Volkswagen*).

Since the decision below, two federal circuits have addressed similar issues, both in the context of cases involving passive restraints. In *Kitts v. General Motors Corporation*, No. 87-2517 (10th Cir. May 19, 1989), the Tenth Circuit simply adopted the approach of the court of appeals in this case, without explaining how this result comported with its 1976 affirmance of the verdict in *Fox v. Ford Motor Company*, *supra*, the rear shoulder harness case. And, in *Taylor v. General Motors Corporation*, No. 87-5829 (11th Cir. June 14, 1989), the Eleventh Circuit explicitly rejected the court of appeals' reasoning in this case, but, relying on this Court's ruling in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), held that Florida common law design defect claims involving the failure to install airbags are impliedly preempted, even though GM could have complied with both federal and Florida law by installing passive restraints, because a ruling favorable to the plaintiffs would "frustrate the federal regulatory scheme." *Taylor*, *supra*, slip op. at 2982. Then, on June 21, 1989, three months after the United States submitted an *amicus* brief specifically disagreeing with the First Circuit's rationale in this case, General Motors made a substantial cash payment to settle

Ritt v. General Motors, *supra*, the Seventh Circuit case which was awaiting decision.

As a result of these various rulings, there is now a stark conflict between the majority below and other federal circuits and state courts of last resort over whether Congress intended to preempt any design defect cases that might have a regulatory effect. Even for those courts finding preemption, there is a sharp disagreement over the theory under which section 1397(c) is, in effect, nullified. There are currently thousands of automobile design defect cases pending throughout the country, over a hundred of which involve claims concerning passive restraints. The preemption issue has been raised or is lurking in every one of them and, therefore, this Court should grant review to resolve the conflict.

2. Whether Congress Intended State Common Law Design Defect Damage Claims To Be Preempted By The Safety Act and Standards Covering the Same Subject as the Defect ,When Section 1397(c) Expressly Preserves All Common Law Claims, is an Important Federal Question.

The majority below decided to disregard the plain and unequivocal words of section 1397(c) because it believed that Congress had not anticipated the development of automobile design defect litigation when it enacted those words into law. That ruling is incorrect both because it contains a mistaken assumption about the state of design defect litigation when the Safety Act was passed and because it impermissibly thrusts the federal courts into a policy-making role of deciding whether to displace state law when Congress has spoken plainly on the subject.

The Safety Act arose, in part, from the huge public clamor created by Ralph Nader's 1965 publication of *Unsafe*

at Any Speed and General Motors' decision to hire a private investigator to conduct surveillance of Mr. Nader. During exhaustive Congressional hearings on the Federal Role in Traffic Safety, held in late 1965 and early 1966, GM's President admitted that it hired this investigator because it was concerned about Mr. Nader's potential involvement in design defect litigation concerning the Corvair. He testified:

> As of November 1 of last year [1965], General Motors Corporation was a defendant in over 100 lawsuits involving potentially about $40 million in damage claims relating to the *design* of Corvair cars of the 1960 through 1963 model years.

Hearings before the Subcommittee on Executive Reorganization on the Federal Role in Traffic Safety, 89th Cong., 2d Sess., Part IV, 1382 (1966) (emphasis added).

Congress heard extensive testimony on GM's response to civil actions alleging design defects, as well as case reviews of a number of those actions. *Id.* at 1382-1591. Congress was also informed of the national publicity being given to deaths and injuries caused by automobile design defects, as well as the thousands of lawsuits anticipated:

> "It is impossible to predict how many injuries and deaths have resulted from the instability of the Corvair automobile,"[plaintiffs' trial lawyer Harry] Philo said, "but my guess is that it would reach five figures." He said that 1,000 suits were brought against automobile manufacturers last year and the number would increase to 5,000 next year.

Id. at 1410-11 (quoting *The Miami Herald*, July 19, 1965).

With this knowledge, Congress nevertheless worded section 1397(c) to preserve all common law claims, regardless of their regulatory effect. In case the plain language of

the provision left any questions, the House Report to the Safety Act explained:

> It is intended, and this subsection specifically establishes, that compliance with safety standards is not a defense or otherwise to affect the rights of parties under common law *particularly those relating to warranty, contract, and tort liability*.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

Moreover, even if Congress had not known of design defect litigation in 1966, the majority below seriously erred in finding implied preemption on the ground that, if Congress had known, it would have extended section 1392(d) to preempt some design defect claims because of their regulatory effect. 865 F.2d 402, Pet. App. 15a. To begin with, Congress surely was aware in 1966 that the common law was continually evolving and expressed no intention whatsoever to limit whatever evolution might take place. In addition, the Safety Act has been amended several times since 1966, and Congress has never altered either section 1397(c) or section 1392(d) to provide for preemption of any design defect claims. Indeed, two years after the Third Circuit's decision in *Dawson*, *supra*, which specifically called the issue to Congress's attention, Congress amended section 1392(d), but did not expand its preemptive effect. *See* S.Rep. No. 505, 89th Cong. 2d Sess. 5 (1983). Finally, as this Court once again reaffirmed only three weeks ago, it is "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Department of State Police*, 57 U.S.L.W. 4677, 4678-79 (June 13, 1989) (citations omitted). The majority below disregarded this rule, ignored the

presumption against preemption, and drastically altered the usual constitutional balance between the States and the Federal Government, despite the fact that Congress had made its intention *not* to do so unmistakably clear.

As a result, the relationship between federal regulations and state common law in design defect litigation is now utterly unclear. Even under the majority below's approach, no one can tell which claims will have a sufficiently powerful regulatory effect to require preemption. Does it turn on the design in question, the purpose of the standard, the number of people injured, the amount of damages involved, or some other factor? Such line drawing is far better suited for Congress than the federal courts, especially given the necessity to balance the competing policy considerations. Since Congress drew its line in sections 1392(d) and 1397(c), the First Circuit should never have embarked on this effort.

Indeed, in some ways, the most troubling aspect of the majority's decision below is that its implied preemption analysis substitutes its judgment for that of Congress, disregarding the proper role of the courts. The majority could not see any reason why Congress would have wanted to preserve common law claims that would have an effect similar to that of a preempted state regulation. It, therefore, almost admittedly rewrote the Safety Act to "extend [section 1392(d)] to this situation." 865 F.2d 402, Pet. App. 15a.

There are two basic problems with this approach. First, as this Court has previously recognized , *see*, *e.g.*, *Silkwood*, *supra*, it is entirely reasonable for Congress to preempt state regulation and leave the indirect regulatory effect of common law claims intact. Second, the decision is one for Congress, not the courts, to make. The "sole task" of preemption analysis "is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1988). Given the presence of section 1397(c) and

the presumption against preemption, once the court below held that there was no express preemption, that should have been the end of the inquiry.

In enacting the Safety Act, Congress had several good reasons for preserving all common law claims, regardless of their regulatory effect. To begin with, Congress wanted to further the Act's sole stated purpose — "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. § 1381 — by ensuring that all design defect victims would be compensated and by preserving the incentive for design improvement that potential tort liability creates. Congress was well aware that the federal motor vehicle safety standards it was authorizing the Executive branch to issue would not provide for victim compensation. It reasonably provided that state common law would continue to fill that role.

In addition, Congress undoubtedly realized that, while common law claims might have a regulatory impact in certain circumstances, their primary purpose is not to alter future conduct, but, rather, to compensate victims. They look backward in time and only alter future conduct by the incentives they create. For example, this case is being litigated in 1989, seeking compensation for a crash that occurred in 1981, involving an auto manufactured in 1976. In contrast, state safety standards are primarily intended to affect future conduct and do not compensate victims. They look forward in time and direct that changes be made.

Moreover, given the long history of federal regulation, Congress was undoubtedly aware of how administrative agencies operate and the role that common law claims can play in enhancing regulatory performance. As history shows, common law suits often uncover facts that prompt administrative agencies to act and provide important protection to consumers when agencies are "captured" by the

industries they regulate. Indeed, Congress traditionally preempts direct state regulation and preserves common law claims — particularly in the area of consumer protection — and, until the decision below, the courts have consistently respected that decision.[5]

Congress may have had other reasons (or, in theory, no reason at all), but, since Congress plainly stated its intent, the court below should have followed it. As this Court recently said in *Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 108 S.Ct. 1704, 1712 (1988), a case in which there was *no* express savings clause similar to section 1397(c):

> The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of [Ohio's compensatory] award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not. Cf. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at

[5] *See, e.g., Abbot v. American Cyanamid Co.*, 844 F.2d 1108 (4th Cir. 1988) (Food, Drug, and Cosmetic Act does not preempt product liability claims); *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir.), *cert denied*, 469 U.S. 1062 (1984) (Federal Insecticide, Fungicide, and Rodenticide Act does not preempt product liability claims); *Raymond v. Riegal Textile Corporation*, 484 F.2d 1025 (1st Cir. 1973) (Flammable Fabrics Act does not preempt product liability claims); *Hubbard-Hall Chemical Company v. Silverman*, 340 F.2d 402 (1st Cir. 1965) (same as *Ferebee*); *Burch v. Amsterdam Corporation*, 366 A.2d 1079 (App. D.C. 1976) (Federal Hazardous Substances Act does not preempt product liablity claims); *McIntire v. Estate of Forte*, 463 S.W. 2d 491 (Tex. Civ. App. 1971) (Federal Aviation Act does not preempt common law claims). *See also* 15 U.S.C. § 2074 (1976) (Consumer Product Safety Act does not preempt common law liability).

256 (Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was preempted).

For the majority below to reject this approach on the basis of a false factual premise and substitute its own judgment for that of Congress is the height of judicial activism. Its unprincipled use of the implied preemption doctrine creates a dangerous and open invitation to the wholesale displacement of state law by activist federal judges. This Court should grant certiorari and reestablish that state law is preempted only when Congress specifically intends to do so. Since section 1397(c) makes plain that Congress had precisely the opposite intent, the ruling below should not stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

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